EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

89-359

CASE NO.
U.S. SUPREME COURT
OCTOBER TERM, 1989
JOE JACK STEWART, PETITIONER
V.
PEARSON LUMBER CO., RESPONDENT
ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR CERTIORARI

Atty. Stuart Shapiro
2606 8th St.
Tuscaloosa, Al 35402
Ph: 752-3464

QUESTION PRESENTED FOR REVIEW

In reference to the "clearly erroneous" standard of F.R.C.P..52(a): Is the Trial Court's finding of facts in favor of Respondent val if Respondent's only evidence is testimony that is openly contradicted and exposed as perjury by Respondent's own document?-- Ie. Is not a finding of "Clear Error" incumbent if there is no valid evidence whatsoever presented by the prevailing party?

TABLE OF AUTHORITIES

Amadeo v. Zant __U.S. __, 108 S. Ct. 1771, 100 L Ed. 2d 249 (1988) Pg. 18,19

Anderson v City of Bessemer City, N.C. 470 U. S. 574, 105 S. Ct. 1504, 84 L. Ed2d 518(1985 Pg. 9,10,17, 17,18,19,21

Bose Corp. v. Consumers Union of U.S. Inc. 466 U.S. 495, 104 S.Ct. 1949 (1984) Pg. 18

Inwood Labs v. Ives Labs 456 U.S. 844, 102 S. Ct. 2182, 72 L.Ed. 2d 606 (1982) Pg. 18

McDonnell Douglas Corp. v Green 411 U.S. 792, 93 S. CT. 1817, 36 L.Ed2d 668 Pg. 5

Pullman Standard v Swint 456 U.S. 287, 102 S. C 1781, 72 L Ed.2d 66 (1982) Pg. 18

Texas Dept. of Community Affairs v. Burdine 101 S. Ct. 1089, 67 L. Ed2d. 207, 450 U.S. 248 (1981) Pg. 5

U.S. v U.S. Gypsum 333 U.S. 364, 68 S. Ct. 525, 92 L.Ed. 746 (1948) Pg. 17

U.S. v. Yellow Cab 338 U.S.338, 70 S. Ct. 177, 94 L.Ed. 150 (1949) Pg. 18,19

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	1
TABLE OF AUTHORITIES	1
STATEMENT OF JURISDICTION	2A
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	9

Page

PROPOSITION: 9

IN RULING THAT THE FACTUAL FINDINGS OF THE FACT-FINDER WERE NOT CLEARLY ERRONEOUS DESPITE THE FACT THAT RESPONDENT'S ONLY EVIDENCE WAS TESTIMONY THAT WAS UNEQUIVOCALLY CONTRADICTED AND EXPOSED AS PERJURY BY RESPONDENT'S OWN DOCUMENT THE ELEVENTH CIRCUIT HAS RULED CONTRARY TO THIS COURT'S TEACHINGS IN Anderson v. City of Bessemer City N.C..

CONCLUSION 17

CERTIFICATE OF SERVICE 22

APPENDIX

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit from which the certiorari is sought was issued on April 19, 1989. A Petition for Rehearing was filed and was demied on May 15, 1989.

The jurisdiction of this Court is invoked persuant to 28 U.S.C 1254(1).

STATEMENT OF THE CASE

This is a U.S.C. 1981/Title Seven discharge case.

Petitioner, Joe Jack Stewart, worked at the Planer at Respondent, Pearson Lumber Co., for approximately ten years until his discharge on April 29, 1983. For the last four years, from 1979, Mr. Stewart single-handedly operated the Planer.

In October 1982, Pearson Lumber Co. (a partnership of Mr. Emmett Dendy, Mrs. Emmett Dendy, and their son Walter Dendy) closed its sawmill and began planing lumber furnished by Belcher Lumber Co.. This made the job of Clarence "Sonny" Cook, a White employee, redundant. In February 1983, Pearson Lumber asked Mr. Stewart to train Sonny Cook how to operate the Planer since it said it

wanted a back-up in case Mr. Stewart got sick and because the volume of planing was increasing. Mr. Stewart tried to train Sonny Cook but with limited success. On April 29,1983, Walter Dendy suddenly came up to Mr. Stewart and told him he was fired and that Sonny Cook was replacing him. This was totally "out of the blue" since there had never been a single complaint from anyone about his work. When Mr. Stewart asked Walter Dendy why he was firing him, Walter Dendy just turned around and walked away.

On May 11 1983, Mr. Stewart filed a charge of racial discrimination with the EEOC. On July 5, 1983 , Walter Dendy wrote and sent to the EEOC Pearson Lumber's Statement of Position. On July 13, 1983 , Mr. Stewart and Walter Dendy attended a EEOC fact-finding conference at EEOC's Birmingham office. On June 13, 1984, the EEOC issued a Determination that there was probable cause that the charge, as alleged, was true. After waiting in vain

for promised EEOC litigation Mr. Stewart obtained a Notice of Right to Sue and brought suit.

In its Statement of Position Pearson Lumber presented two concrete reasons for discharging Mr. Stewart: 1-That he was unable to learn how to properly operate the Planer, and 2- That he ruined "several thousand" feet of lumber on April 29, 1983, the date of his discharge. The deciding issue in this case, as is usual in this type of litigation, is whether Pearson Lumber's reasons are pretextual or not. See McDonnell Douglas v Green 411 U.S. 792,93 S.Ct. 1817, 36 L. Ed 2d 668 (1973) and Tex. Dept of Community Affairs v Burdine, 450 U.S. 248, 101 S.Ct.1089

Petitioner, Mr. Stewart, presented six different types of evidence exposing these reasons as pretext:

Three are documentary: Pearson Lumber's own Answer in which it admitted that it asked Mr. Stewart to train Sonny Cook how to operate the

the Planer months before it fired Mr. Stewart for being unable to learn how to properly operate the Planer!;Pearson Lumber's own payroll records which show that Mr. Stewart had received an extremely high wage relative to other employees for two years although he was supposed to be unable to learn how to properly do his job!; Paragraph 10 of Pearson Lumber's Statement of Position which states that planing was under"constant observation", which directly contradicts even the possibility of ruining several thousand feet of lumber since it is undisputed that ruining such an amount would take at least 30 minutes!

Two are Respondent's own statements: It is undisputed that Walter Dendy asked Mr. Stewart for help and information regarding problems with the Planer months after he fired Mr. Stewart for being unable to learn how to properly operate it!; Emmett Dendy at deposition admitted that Mr. Stewart, the man unable to learn how to properly operate the Planer, had

been singlehandedly operating it fifty to sixty hours a week without any problems!

The sixth is the testimony of eight employees that Mr. Stewart, the man supposedly unable to learn how to properly operate the Planer, had singlehandedly operated it for years! Pearson Lumber denied this, saying only 5-6 months. It produced... no witnesses to support this!

The obvious power of these six types of evidence was such that Respondent made only a half-hearted attempt to counter them; an attempt easily disposed of by Petitioner in it's Reply Brief. Pages 25,26, and 33 of Respondent's appellate brief contains these attempts and Pages 7,8,9,14,15 of Petitioner's Reply brief shows how they were disposed of. These pages are included in the Appendix as pages 28a-40a.

Respondent, Pearson Lumber, presented only one type of evidence at trial: The testimony of two witnesses, Emmett Dendy and a Clant Johnson, that <u>they had observed</u> that Mr. Stewart's job performance was unsatisfactory and that

they had discussed this unsatisfactory job performance with Mr. Stewart and then informed Walt Dendy, who did not even testify, of this problem who then fired Mr. Stewart.

This testimony, however, is openly contradicted and exposed as perjury by Respondent's own Statement of Position (Pgs. 41a-47a) which it submitt to the EEOC; because in this document Walt Dendy, who did not testify, unequivocally states that he and he alone observed that Mr. Stewart's job performance was unsatisfactory and that he and he alone discussed this unsatisfactory job performance with Mr. Stewart! No Clant Johnson, no Emmett Dendy!

In spite of all the above the Trial Court entered Judgement and findings of fact in favor of Respondent. The Trial Court gave no oral or written explanation for its decision and adopted, essentially verbatim, the "Statement of Facts" which Respondent had prepared prior to trial.

Petitioner appealed under the Clearly

Erroneous standard of F.R.C.P. 52(a) to the Eleventh Circuit Court of Appeals. After oral argument, the Court affirmed without opinion (It's normal procedure in F.R.C.P. 52(a) appeals persuant to 11th Circuit Rule 36-1(a)). The Court then denied a Petition for Rehearing.

(i)-28 U.S.C. 1291

(j)- Petitioner argues that the Court of Appeals has misinterpreted the Clearly Erroneous standard of F.R.C.P. 52(a) as that standard has been interpreted by the Supreme Court in Anderson v. City of Bessemer City, North Carolina 470 US, at 574, 84 L Ed 2d 518 105 S Ct 1504 (1985).

F.R.C.P. 52(a) states in pertinent part that "Findings of Facts should not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses".

This standard is explained in Anderson v. City of Bessemer City, North Carolina 470 US 574, 84 LEd 2d 518 105 S Ct 1504 (1985), a discrimination case wherein the Court reversed the U.S Court of Appeals for the Fourth Circuit because of its failure to adhere to the clearly erroneous standard: "Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court's finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a): 'Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'. The question before us, then, is whether the Court of Appeals erred in holding the District Court's finding of discrimination to be clearly erroneous.

"Although the meaning of the phrase 'clearly erroneous' is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from out cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that '(a) finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' United States v United States Gypsum Co. 333 US 364,395, 92 L Ed 746, 68 S Ct 525 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply becaused it is convinced that it would have decided the case differenty. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the

role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo.' Zenith Radio Corp. v Hazeltine Research, Inc. 395 US 100,123, 23 L Ed 2d 129, 89 S Ct 1562 (1969) If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even thought conviced that had it been sitting as the trier of fact, it would have weighed the evidence differently, Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.. United States v. Yellow Cab Co. 338 US 338, 342, 94 L Ed 150, 70 S Ct 177 (1949); see also Inwood Laboratories Inc. v Ives Laboratories, Inc. 456 US 844, 72 L Ed 2d 606, 102 S Ct 2182 (1982).

"This is so even when the district court's findings do not rest on credibility determinations , but are based instead on physical or documentary evidence or inferences from other facts. To be sure, various Courts of Appeals have on occasion asserted the theory that an appellate court may exercise de novo review over findings not based on credibility determinations. See, e.g. Orvis v Higgins, 180 F2d 537 (CA2 1950); Lydèe v United States, 635 F2d 763,765 n 1 (CA 6 1981); Swanson v Baker Industries, Inc. 615 F2d 479, 483 (CA8 1980). This theory has an impressive genealogy, having first been articulated in an opinion written by Judge Frank and subscribed to by Judge Augustus Hand, see Orvis v Higgins, supra, but it is impossible to trace the theory's lineage back to the text of Rule 52(a), which states straightforwardly that ' findings of fact shall not be set aside unless clearly erroneous.' That the Rule goes on to emphasize the special deference to be paid credibility determinations does not alter its clear command: Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly

erroneous.' Pullman-Standard v Swint. 456 US, at 287, 72 L Ed 2d 66, 102 S Ct 1781

"When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. See Wainwright v Witt 469 US 412, 83 L Ed 2d 841, 105 S Ct 844 (1985). This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination. See, e.g., United States v United States Gypsum Co., supra, at 396, 92 L Ed 746, 68 S Ct 525. But when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error. Cf. United States v Aluminum Co. of America, 148 F2d 416, 433 (CA2 1945); Orvis v Higgins, supra, at 539-40."

470 U.S., 573-576; 84 L. Ed. 2d, 528-530.

As the quotation clearly indicates findings of a trial Judge are generally accorded great deference, especially when based on determinations regarding the credibility of witnesses.

However, the Court's attention is directed to that part of the quotation beginning "This is not to suggest" which states that this deference is not unlimited; that theoretically there could be exceptional cases in which factors are present which would cause an appellate court to not credit the witness' testimony and to find clear error. Special attention is directed to the phrase "Documents or objective evidence may contradict the witness' story."

This case is one of these exceptional cases. This is especially clearly so because: 1- The only evidence presented by Respondent was testimony ; 2- This testimony is contradicted and exposed as perjury by Respondent's own document ; and 3- The contradiction is so clear and indisputable. This last point will soon be dramatically proven to this Court.

This case, then, is an illustration of the principle that even in the extreme situation where only testimonial evidence is presented by a party the deference to be extended to

the Trial Court's findings of fact for that party is not unlimited... that clear error may in fact be found even in this situation.

Petitioner has presented the legal basis for this Petition. There remains, however, one major practical, factual hurdle to cross: To prove to this Court that there is, in fact, this contradiction between Respondent's testimony and Respondent's document, it's Statement of Position.

This contradiction is so clear and so indisputable that Petitioner will prove this by a very unusual and completely indisputable method: By solely using Respondent's own appellate brief and Respondent's own document!

Pages 12-22 (the pages in which Respondent presented its evidence) of Respondent's appellate brief and Respondent's STATEMENT OF POSITION CONCERNING LAYOFF OF MR. JOE JACK STEWART are included together in the appendix of this Petition.

A reading of Pages 12-22 of Respondent's

appellate brief (Pgs. 14a-27a)will show this Court that the only evidence that Respondent presented was the testimony of Emmett Dendy and Clant Johnson that they had observed that Petitioner's job performance was unsatisfactory and that they had discussed this unsatisfactory job performance with Petitioner and then(See Pages 22a-23a) informed Walter Dendy, who did not even testify, of this problem who then fired Petitioner.

A reading of the Statement of Position (Pgs. 41a-47 however, shows that Walter Dendy, who did not testify, states that he and he alone observed that Petitioner's job performance was unsatisfactory (See Paragraph 11) and that he and he alone discussed this unsatisfactory job performance with Petitioner(See Paragraph 02) !! No Clant Johnson, No Emmett Dendy ! This is a point-blank contradiction of Respondent's only evidence,which is the testimony of Clant Johnson and Emmett Dendy!

In summation, the Court of Appeals misinterpreted the clearly erroneous standard of F.R.C.P. 52(a) to mean the accordance of complete deference to the Trial Court's determinations of testimonial credibility. This is in direct conflict with the Supreme Court's previously cited dicta in Anderson, supra, 470 U.S. 575 that "the Court of Appeals may well find clear error even in a finding purportedly based on a credibilty determination". Furthurmore, because Respondent's only evidence is exposed as perjury there are not "two permissable views of the evidence" to choose from, Anderson, supra, at 574 nor would an Appellate Court be merely "weighing the evidence differently" as this Court also aptly warned about in Anderson, supra, at 574.

Finally, this Court in Anderson quoted this Court's seminal decision in U.S. Gypsum, supra, to the effect that a " a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" Anderson, supra, at 573. In this

case, of course, the situation is infinitely more extreme for there is no evidence to support Respondent's facts.

CONCLUSION

Since the 1948 case of U.S. v U.S Gypsum, supra, which involved questions of mixed law and fact (See 333 U.S. at 396, 68 S Ct 525) by this Court's own admission(Supra, at 396 , at 525) despite being cited in the dicta of Anderson, supra, which was quoted at length in the previous pages,

this Court has issued a considerable number of decisions regarding the Clearly Erroneous standard including Amadeo v. Zant _____ U.S. _____, 108 S. Ct. 1771, 100 L. Ed. 2d. 249 (1988); Anderson, supra; Pullman Standard v. Swint 456 U.S. 287, 72 L.Ed. 66, 102 S. Ct. 1781 (1982); Bose Corp. v Consumers Union of U.S. Inc. 466 U.S. 495, 104 S. Ct. 1949 (1984); Inwood Labs Inc. v Ives Labs Inc. 456 U.S. 844, 102 S.Ct. 2182, 72 L. Ed. 2d. 606 (1982); United States v. Yellow Cab Co. 338 U.S. 338, 70 S. Ct. 177, 94 L. Ed 150 (1949).

All these decisions have been to the effect that the Appeals Court should have deferred to the Trial Court's factual determinations; that the Appeals Court should not have found Clear Error.

In contrast to this unbroken line of decisions the Supreme Court has only mentioned, in dicta in

Anderson, supra, the abstract notion that a finding of Clear Error might theoretically be possible in a case involving testimony.

To put the above in another way; there is an enormous one-sided imbalance in the Supreme Court's treatment of the Clearly Erroneous standard: A continuous line of decisions from U.S. v. Yellow Cab, supra, to Amadeo v. Zant, supra, have held that Clear Error should not be found and have presented various types of fact-situations which illustrated why a finding of Clear Error was not appropriate; which provided concrete examples of the criteria to be used in making this decision. On the other hand, there has been only the dicta in Anderson, supra, to indicate that Clear Error might even possibly, theoretically, be appropriate in cases involving testimony; and therefore, naturally, there have been no decisions illustrating what facts would be sufficient to justify a finding of Clear

Error; ie- no concrete examples to serve as guidelines to determine what is, in fact, "Clear Error

In short there has been a complete bias or imbalance, against finding "Clear Error", in the Supreme Court's exposition of the "Clearly Erroneous" standard.

The telling measure of the severity of this imbalance is what happened in this case: Respondent's only evidence was testimony but that very testimony is openly contradicted and exposed as perjury by Respondent's own document. The net effect of this, therefore, is that there is no valid evidence whatsoever in favor of Respondent. In spite of this the Court of Appeals would still not find Clear Error.

This bizarre and inexplicable decision did not occur in a vacuum. The Court of Appeals was acting in the context of a long line of decisions emphasizing and illustrating that Clear Error should not be found versus an utter absence of precedent emphasizing and

illustrating that Clear Error should be found. Given this skewed one-sided framework within which to operate it should be no surprise that decisions such as this would occur.

Plaintiff respectfully submits to this Court that a more balanced approach, one indicating that mistakes can be made in both directions, is needed to ensure fair treatment of F.R.C.P. 52(a) appeals. This is especially important since Courts of Appeals apparently must deal with great numbers of such appeals and therefore, as Justice Powell emphasized in a concurring opinion in Anderson, supra at 581, there always exists the possibility of less than thorough review of these types of appeals.

In Summary, Petitioner argues that the Clearly Erroneous standard, while equitable in the abstract, has de facto been developed by exposition into a skewed one-sided standard. Petitioner respectfully urges this Court to especially read Pages 12-22 of Respondent's own appellate brief (Pgs. 14a-27a) and compare

the evidence contained therein, the testimony of Emmett Dendy and Clant Johnson that they had observed and discussed supposedly inferior job performance, with Respondent's own Statement of Position (especially Paragraphs 11 and 02)(pg41a-4 which clearly and unambiguously states that Walter Dendy, alone, was the one who supposedly did this. This point-blank exposes Respondent's only evidence as perjury.

Although there is no precedent to indicate that this type of fact situation crosses the threshold to qualify as Clear Error (indeed the problem is, as has been stated, that there is no precedent in favor of finding Clear Error) it is hard to imagine what more would be needed!

Petitioner respectfully submits that if the prevailing party's only evidence is unambiguously point-blank contradicted and exposed as perjury but this is still not enough to qualify as Clear Error then perhaps F.R.C.P. 52(a) should be amended to simply eliminate the Clearly Erroneous standard!

Atty. Stuart Shapiro

2606 8th St.

Tuscaloosa, Al. 35402

Ph: (205)-752-3464

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing matter with a copy of this pleading by depositing in the United States Mail a copy of same in an envelope with adequate postage prepaid thereon and properly addressed to him.

This 27 day of June, 1988

Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

JOE JACK STEWART, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 87-G-0927-W
PEARSON LUMBER CO., Defendant.	)	

FINAL JUDGEMENT ORDER

This cause came to be tried before the court August 25, 1988, and August 26, 1988. Pursuant to the findings of fact dictated into the record at the conclusion of the trial, judgment is hereby ENTERED in favor of the defendant.

DONE and ORDERED this _____ day of August 1988.

_____
UNITED STATES DISTRICT JUDGE
J. FOY GUIN, Jr.

And I'm going to hold for the defendant. Although there's a prima facie case made, I feel that the articulated reasons from the defendant are not pretextual and have not been shown to be pretextual, and consueqntly judgment will be entered for the defendant. And I'm going to adopt all of the plaintiff's statements of facts as modified by the defendant. I'm adopting all those modifications. In other words, where there are lined out things, they'll be left out of the findings.

On the facts proposed by the defendants, I'm going to adopt 1, 2, and 3, 6, 7, 8, 9, 10. These are without the plaintiff's modifications, unless I say differently. The way these have been done, the plaintiff has taken the defendant's proposed facts, proposed to be proved, and has lined out many of them and written in additional statements. So, when I say I'm adopting the defendant's proposals by a number, I mean without the modifications, unless I say I'm adopting the modification. So far, I've not adopted any through Paragraph 10. I'm also adopting 13, 17. I don't thing that the date is particularly relevant. There's a three year difference. I'll just leave the date out of the adoption. Adopting 19 without the modification. 20 is adopted, 21, 22. I'm not adopting 23. I'll adopt 24 and 5. I will make an addition in 24. It says "unable"

once, and "unable or unwilling" another time. And I'm going to make it read "unable or unwilling" both times. And let's see. Adopt 25 and 26. I'll adopt 27. Again, I don't think the dates in 28 are critical. I just adopt it without the dates. 29 is adopted, as are 30, 31, 32, 32, 33, 36, 37, 38, 41. I'll rephrase 42, and say that on April 29, 1983, the plaintiff was discharged because he was unable or unwilling to do the work. I'll adopt 43, 44, 45, 46, 47, 48, 49, 50, and 51. No. I'll leave out 51. Leave out 50. Just adopt 49. And I'll adopt 56, and then 58 through 64, with the alterations made by the plaintiff, which -- all of which add the phrase, "according to Pearson's records," or in the case of 62, "according to Pearson's Answer to Interrogatory Number 8." But I am adopting the conclusion stated in each of those paragraphs. It is a matter of record and I have not heard any evidence that would cause me to vary from what the records show in a holding. Now, where did I leave off? I meant to go through 64. Is that what I said? 58 through 64, and then 66. and that's it.

I hope that wasn't too fast to follow. But I had been listening carefully and I went through those factual findings as carefully as I knew how. And I'm

UNITED STATES DISTRICT COURT
Northern District of Alabama

JOE JACK STEWART,	*	
	*	CIVIL ACTION NO.
PLAINTIFF,	*	
	*	CV-87-G-0927-W
VS.	*	
	*	
PEARSON LUMBER CO.,	*	
	*	
DEFENDANT	*	

FACTS PROPOSED TO BE
PROVED BY DEFENDANTS

1. The defendant, Pearson Lumber Company, is a partnership consisting of Emmett Dendy, Emmett's wife, and Emmett's son, Walt Dendy. 2. Prior to October of 1982, Pearson's operations included a sawmill as well as a planer and most of the wood planed by Pearson cam from Pearson's own sawmill. 3. During this 1982 time period the planer was "dressing" mostly hardwood "two sided" and getting it ready for molding. 4. Planing hardwood involves more precision than dressing pine.

5. The average volume of lumber going through the planer during this time period was only 15,000 feet per day.

6. The planer was operated by a "planer operator" and

one or more helpers. 7. The planer operator is in charge of manufacturing the lumber, dressing the lumber to the proper size and thickness and keeping and maintaining the planer in good mechanical repair.

8. It is also his responsibility to watch the lumber to see that it is planed properly.

9. The planer operator operates the planer as well as a knife grinder.

10. The plaintiff, Joe Jack Stewart, was employed at Pearson Lumber Company from 1972 until his discharge on April 29, 1983. 11. He began working at the planer operation as a helper while Harvey "Brother" Johnson, a black male, was the planer operator, and he worked there as a helper for approximately ten years.

12. Arthur Lee Terry, a black male, became planer operator when Johnson left, and the plaintiff "fed" the planer by inputting the wood. 14. Gene Bibby, a white male, also worked as a helper in feeding and running the planer.

15. The plaintiff says that neither Harvey Johnson, nor Arthur Lee Terry, taught him how to run the planer. 16. Rather, he says, that he taught himself while working for another employer in the 1950's while using a different

type of planer.

17. Terry left in the Fall of 1982, leaving Stewart and Bibby at the planer.

18. Bibby had never shown any interest to step up.

19. Thus, Stewart became the planer operator in October of 1982.

20. Bibby continuted to feed the planer.

21. At about the time that Arthur Lee Terry left, Pearson Lumber Company shut down its sawmill operation and worked out a business arrangement with Belcher Lumber Company of Centreville, Alabama, to process pine lumber from Belcher.

22. As a result, the volume of lumber processed by the planer tripled and, necessarily, the planer became a more vital, core part of Pearson Lumber Company's business than before.

23. The number of maintenance problems also increased.

24. This increase in attention to the planer operation revealed that the plaintiff, Stewart, was unable to dress the pine lumber correctly or uniformly according to customer specifications and was unable or unwilling to keep the planer in proper mechanical repair.

25. Insofar as dressing the lumber, the root of the problem seemed to be that the planer was not kept in proper

alignment by the plaintiff. 26. In an effort to alleviate the problem, Clant Johnson of the S.P.I.B. (Southern Pine Inspection Bureau) was brought in in November of 1982.

27. The S.P.I.B. is a governing agency governing the grading of southern pine, and they aid employees in the planing of the lumber because this has an effect upon the grade of the lumber. 28. Johnson observed the Pearson Lumber Company planer operation on three or four separate occasions between November 1982 and April 1983.

29. While there, Johnson discussed with the plaintiff the method for properly aligning the planer.

30. However, when Johnson would return on a subsequent visit the planer would be improperly aligned again.

31. Johnson informed the Dendy's that the plaintiff was not open or receptive to suggestions on operation of the planer.

32. The plaintiff testified that, "there ain't nothing there that - ain't nothing I don't know how to do." 33. When asked if he ever had to get anybody to help him make adjustments to the planer, the plaintiff replied: "Never did, don't need nobody."

34. The Dendy's received complaints from Belcher Lumber Company about the planer situation. 35. Emmett

Dendy also received a complaint from a customer, Addison Lumber Company, about improper planing of the lumber

36. Emmett Dendy told the plaintiff of the problem.

37. The plaintiff concedes that if any lumber was "messed up", it would have been his own fault.

38. About a month later, and just a few weeks before the plaintiff's dismissal, Emmett Dendy inspected the planer operation again and found that Stewart was allowing wood to be improperly planed again.

39. When he was confronted with the problem the plaintiff replied that "This is just getting beyond me."

40. Emmett Dendy told him, "Well, Jack, is this keeps on, we'll all be out of a job."

41. Emmett Dendy then told Walt Dendy that something had to be done to resolve the problems at the planer.

42. On April 29, 1983, the plaintiff was discharged because he was not able to do the work properly.

43. At the time of his dismissal, the plaintiff was being paid at a rate of $7.00 per hour

44. He was paid more than anyone else working at the planer operation, including white employees.

45. The plaintiff admits that he was not paid differently that others based on his race.

46. The plaintiff was replaced by Clarence (Sonny) Cook, a white male, who had been transferred from the machine shop to the planer operation in February of 1983. 47. On previous occasions Cook had been brought in to provide assistance in the maintenance and repair of the planer and it was felt at the time of his transfer that his mechanical ability would be helpful.

48. The Dendy's also wanted someone else working at the planer operation in case someone got sick.

49. Clant Johnson observed Cook's performance and also gave him instruction on the proper operation of the planer. 50. Johnson informed the Dendy's that Cook was more receptive and open to suggestions on the operation of the planer than the plaintiff.

51. The Dendy's also saw that Cook's potential and ability were better and that he made good progress insofar as mastering the planer operation.

52. At the time of the plaintiff's dismissal, Cook was being paid only $6.50 per hour. 53. Upon his promotion, he was raised to $7.00 per hour.

54. During Cook's tenure as planer operator there was certainly no further decline in the quality of the planing.

55. Loper Lumber Company even tried to hire Cook
ay from Pearson Lumber Company, forcing the Dendy's to
fer Cook medical insurance coverage and a slight raise
an incentive for him to stay.

Cook hurt his back a few months after the plaintiff's
smissal and was replaced in the position of planer
erator by Greg Hill, a black male who had been acting
a lumber grader in the planing operation.

57. Pearson Lumber Company hired a white male,
lbert Simmons, to work under Hill.

Pearson Lumber Company has more black employees than
te employees, and has very few white employees.

Poor work performance by the few whites that are
loyed does not go unpunished.

For example, Jim Kinkead, a white shop foreman, was
rminated on February 21, 1979, because he was unable to
form his job and because of his inability to communicate
h people.

Dwight Prescott, a white foreman of the logging crew,
terminated on August 24, 1980, because of his involvement
an altercation while on duty.

On both occasions, the white employees were replaced
a black male.

. No one ever told the plaintiff that he was discharged
e to his race, not even the line employees at Pearson
mber Company.

. The plaintiff never heard anyone making any racial slurs
remarks while he was employed there.

. After his discharge, the plaintiff did not use reasonable
forts to obtain new employment and actually quit the only
b he eventually got.

. The plaintiff is not entitled to recover for discriminatio
the rate of his pay and in any event, he did not file a
mely EEOC charge.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 88-7539

D. C. Docket No. 87-0927

OE JACK STEWART,

Plaintiff-Appellant,

versus

EARSON LUMBER COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(April 19, 1989)

efore TJOFLAT and HACHETT, Circuit Judges, and ESCHBACH*,
enior Circuit Judge.

ER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

Costs taxed against plaintiff-appellant."

Honorable Jesse E. Eschbach, Senior U. S. Circuit Judge for
he Seventh Circuit, sitting by designation.

Judgment Entered: April 19, 1989
For the Court: Miguel J. Cortez,
Clerk

By:_____
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 88-7539

JOE JACK STEWART,

Plaintiff-Appellant,

versus

PEARSON LUMBER CO.,

Defendant-Appelle.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING
(May 15, 1989)

BEFORE: TJOFLAT and HATCHETT, Circuit Judges, and ESCHBACH*, Senior Circuit Judge

PER CURIAM:

The Petition(s) for rehearing filed by appelant Joe Jack Stewart is

ENTERED FOR THE COURT:

United States Circuit Judge

*Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

2.

Burden of Proof

Stewart brought this action under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.

Title 42 U.S.C. Section 1981 provides in pertinent part:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."

Liability may not be imposed under Section 1981 without proof of intentional, purposeful discrimination. General Building Contractors Ass'n., Inc., v. Pennsylvania, 458 U.S. 375, 102 S. Ct. 3141, 73 L.Ed.2d 835 (1982); Freeman v. Motor Convoy, Inc., 700 F.2d 1339 (11th Cir. 1983).

Similarly, in a disparate treatment action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq., a discriminatory intent must be proven. Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795 (5th Cir. 1982).

3.

Analysis

The trial court's finding that Stewart's discharge was not based on race was correct and not "clearly erroneous".

Emmett Dendy testified that the company had been in business since early 1950 and that he had been involved with the business since its inception. (Tr. 291). After beginning as general superintendent, Dendy became a partner in the company in the late sixties or early seventies. (Tr. 292). During the entire time Emmett Dendy has been "hiring and firing", the percentage of blacks among the company's work force has exceed ninety percent. (Tr. 292-293)

The principal business of Pearson Lumber up until 1982 was buying land, getting hardwood timber off the land, sawmilling the timber and then selling it "rough". (Tr. 293-294). Only a very small percentage of the 20,000 feet of timber going through the sawmill was "dressed" or planed by the planer. (Tr. 294). The company's planer operation was not a major facet of its business. (Tr. 294). In fact, the planer was not even run "full-time". (Tr. 294).

The planer was used to plane wood to make such things as fence posts out of four-by-four timbers and four-by-six timbers, as well as low grade hardwood for a box factory, neither of which required a high degree of precision or accuracy from the planer. (Tr. 294-295). It was planed "hit or miss" and "a little small wave or something didn't matter". (Tr. 301). It was not "finished" lumber and usually has a variance of a fraction of an inch which

was acceptable to the customer. (Tr. 295).

There was a downturn in the business and a drop in prices in the industry which caused the company to suffer "a tremendous loss" and "tough times" in 1982 and 1983. (Tr. 295-296). The value of the company plummeted by millions of dollars and, as Emmett Dendy described it, "We almost went under." (Tr. 296).

Facing this dilemma, Pearson Lumber Company decided to take steps to save its economic life. (Tr. 296-299). Due to substantial competition from other sawmill operations, as well as the age of its own sawmill, the company shut down its sawmill and laid off over 100 employees. (Tr. 296-298). It then entered into an agreement with Belcher Lumber Company to receive lumber from Belcher, plane the lumber, dry kiln it and then sell it to customers in exchange for a percentage of the invoice price. (Tr. 297-299). Under this agreement Belcher could cease doing business with Pearson Lumber Company at any time if the wood was not planed properly. (Tr. 299). Moreover, if the wood was not planed properly and it brought less money, that would impact on the income of both Pearson and Belcher. (Tr. 299).

These changes had a great impact on the planer operation. (Tr. 299-300). Instead of planing low grade

hardwood, Pearson Lumber Company began running "C" and better pine, making such things as twelve-inch step treads and which were sold to retail customers in Atlanta, Georgia. (Tr. 300-302). In contrast to the wood that had previously been run through the planer, the wood from Belcher required a much higher degree of accuracy and precision from the planer. (Tr. 302). Not only did the quality of the wood and the desired product increase, but the quantity of wood being planed increased. Instead of running 10,000 feet a day, Pearson began running four to five times that much, requiring extra hours to be worked. (Tr. 300, 329-330).

The planer operation was originally purchased from Druid Manufacturing Company in the early 1950's. (Tr. 303). The first planer operator was a white man, Mr. McBride, who had been working for the previous ownership and was retained by Pearson. (Tr. 303). When McBride retired Pearson Lumber Company chose to replace him with a black man, Harvey Johnson. (Tr. 303). Johnson stayed until the early 1970's. (Tr. 304). When Johnson retired he was replaced by another black man, Arthur Lee Terry. (Tr. 305). When Terry took over the quality of planing declined. (Tr. 305). However, he did a good enough job

to get by, given the lack of importance of the planer operation. (Tr. 306). Stewart, the plaintiff, acted as Terry's helper and would take over the planer when Terry was absent. (Tr. 18, 305-306). When Terry left, Stewart became the head planer operator. (Tr. 306). Stewart was officially given full responsibility in the fall of 1982. (Tr. 306, 377).

With the changes in the business causing the elevation of the planer operation in importance to the business, the management focus on the planer naturally increased. (Tr. 306-307). As a result, Emmett Dendy began to notice several problems developing at the planer operation. (Tr. 308).

Specifically, he noticed problems with the "dressing" of the lumber. (Tr. 309). As Emmett Dendy described it,

> "It was waving. On the edges was wavy. Side heads was wavy. We had trouble with biting off on the end, about six inches, as the board went out. It wasn't held properly. It would rise up and it was top heavy and we would find a little bite out. And then it was also thicker on one edge and thin out on the other, this type of thing."

(Tr. 309). Pearson Lumber Company received complaints from customers. (Tr. 310). The company also received complaints from Belcher Lumber Company (Tr. 311, 327-328).

The number of hours of operation of the planer also increased, sometimes to as many as sixteen hours per day. (Tr. 311). Pearson Lumber Company contemplated running the planer operation in two shifts, which would require more than one planer operator. (Tr. 320). This increase in hours also created safety hazards for the planer mill employees and increased labor costs because the employees were being paid "time and a half" overtime wages. (Tr. 329-331, 311-312). In addition, because the planer was such a critical feature of the business any absences due to sickness of the planer operator would cause the operation to shut down. (Tr. 312).

The increase in volume of lumber going through the planer operation also caused a correspoding increase in the number of repair problems on the planer. (Tr. 118).

In order to alleviate the labor and repair problems, Clarence "Sonny" Cook, a white male, was transferred from the machine shop to the planer operation. (Tr. 312). Cook had experience in making repairs of the planer machine and he was viewed as "ideal to come in and try to learn it". (Tr. 312). Pearson Lumber Company had no intention of replacing Stewart with Cook. (Tr. 320-321).

To analyze the problem with dressing the timber, Pearson Lumber Company obtained the assistance of a man

named Clant Johnson. (Tr. 309-310). Johnson, who was sixty-six years old at the time of trial, was an employee of the Southern Pine Inspection Bureau (S.P.I.B.) in Pensacola, Florida. (Tr. 265), a nonprofit organization which is involved with quality control in the manufacturing and grading of pine lumber. (Tr. 265). Johnson has never been an employee of Pearson Lumber Company. (Tr. 265). His duties with S.P.I.B. included providing instruction to employees of planer operations around the southeastern United States on the proper operation of a planer. (Tr. 265-266).

Johnson's first experience with a planer was in 1942. He spent the next twenty-five years running a planer and then was promoted to supervisor and then mill manager. (Tr. 266). He assisted in writing a course book on the subject of planer mill operations entitled "Manual For Planer Operatoions and Knife Grinding". (Tr. 266-267). Since 1976, 1,176 men have been taught by him in planer operation courses. (Tr. 266).

Johnson testified that he observed the planer operation at Pearson Lumber Company while Stewart, the plaintiff, was operating the planer and concluded that "the planer was not being operated in the fashion that they could sell their lumber without complaints." (Tr. 267-268).

Johnson further testified that the planer was not being properly "aligned" and that the "side head knives" were not being ground properly. (Tr. 268, 273-275). This caused the wood to "rub board" and to be "wedge-shaped", i.e., thicker on one edge than the other, and also caused the grain on the wood to be raised and tears around the knots. (Tr. 273-277).

At the trial Johnson demonstrated the working of the planer by drawing on a board, explaining how Stewart had been aligning the planer and how the planer should have been aligned. (Tr. 269-273). He testified that the method that Stewart had been using to align the planer -- a method he termed the "old way" -- was no longer appropriate due to changes in the wood products industry. (Tr. 277-278). He also explained how the side head knives were supposed to be ground. (Tr. 274-275).

Johnson further testified that while he was at Pearson Lumber Company, he taught both Stewart and Cook how to properly operate the planer. (Tr. 279). Emmett Dendy testified that he relied on Johnson to teach Cook the "fine points" of the operation of the planer. (Tr. 313). In any event, Johnson also properly aligned the planer and "it was fine when I left that time". (Tr. 273). However, when he returned the planer was out of alignment

again, causing the wood to be wedge-shaped. (Tr. 273-274, 279, 281). He found that Stewart had regressed to using the "old way" of alignment. (Tr. 279). Johnson says this happened on "at least three and maybe even four occasions." (Tr. 279-280). Johnson also found that Stewart was not as "open" as Cook was to learning the proper techniques. (Tr. 280). Emmett Dendy testified that "We felt that Jack had the attitude that he knew it, he didn't need teaching." (Tr. 320).

Johnson informed the Dendys of his problems with Stewart's failure to follow his instructions. (Tr. 280). This was understandably upsetting to Emmett Dendy. (Tr. 313). Dendy also continued to receive customer complaints. (Tr. 313-314).

After receiving a complaint from a customer in Atlanta who refused to purchase any more products from Pearson Lumber Company, Emmett Dendy returned from Atlanta and found even more wood being improperly planed. He went to Stewart and told him that

> "Something has got to be done. We just can't keep this up. If we do, we're -- and Jack says, well, I just don't know. Says, this is beyond me. I guess I'll just have to do something or something else. I said, well, if somebody doesn't, we'll all be out of a job."

(Tr. 314-316).

Emmett Dendy then went to the company office and

spoke with his son, Walt:

> "I said, Walt, something has got to give. I said, it's still going on, ruining lumber, and we're going to be out of business if we don't do something about it."

(Tr. 317).

Stewart was discharged on April 29, 1983, and replaced by Cook. (Tr. 319-321). Cook was not paid any more than Stewart had been upon his promotion. (Tr. 321-322). Clant Johnson returned following Stewart's departure and found the planer to consistently be in proper alignment and that "the finish has been beautiful." (Tr. 281). Cook hurt his back and was replaced by Greg Hill, a black man, in 1983. (Tr. 322-323).

Emmett Dendy testified that race had absolutely nothing to do with the decision to discharge Stewart. (Tr. 323-324).

Under this evidence, the District Court could have properly found that Stewart's discharge was not based on race but, rather, on Stewart's failure to "change with the times." The nature of Pearson Lumber Company's business changed and this impacted upon the planer operation. The company attempted to assist and teach Stewart to adapt to these changes but was unsuccessful because Stewart was simply not receptive. When Stewart repeatedly produced a poor product because of his failure to adhere

to the teachings rendered to him, he was discharged.

Indeed, Stewart's own testimony supports the conclusion that his discharge was not based on race, and further supports Pearson Lumber Company's version of the facts.

Stewart testified that neither the Dendy's nor the supervisors or even the line employees ever told him that his discharge was based on race (Tr. 92-93), or even mentioned race to him. (Tr. 148).

Stewart also admitted that at no time during his employment did he ever hear any racial slurs, jokes, or remarks. (Tr. 93, 148).

Stewart further testified that there have been more black planer operators at Pearson Lumber Company than white planer operators. (Tr. 93). Moreover, he conceded that when Arthur Lee Terry retired, he (Stewart) was promoted to head planer operator over a less qualified white man, Gene Bibby. (Tr. 95-96).

With regard to his own qualifications to be a planer operator, Stewart told the trial court on cross-examination that the only occasion that he worked at a planer operation before becoming employed at Pearson Lumber Company was in the 1950's when he operated a planer for "Hale Newton: for "a little over a year". (Tr. 100). However,

on direct examination Stewart had testified that a person could not learn how to operate a planer machine in one year. (Tr. 28, 101). In any event, Stewart also testified that he received no further instruction on how to operate Pearson's planer before becoming head planer operator there. (Tr. 103). Consistent with Clant Johnson's and Emmett Dendy's conclusions that Stewart was not receptive to instruction, Stewart testified that he knew it all:

> "Q. And you didn't need to be told anything, did you?
>
> A. No, I didn't need to be told nothing.
>
> Q. According to your testimony, you knew it all from that year you had spent at Hale Newton in the 1950's on a different kind of planer, isn't that right?
>
> A. That's right.
>
> Q. When you came in, you didn't try to let them teach you anything, did you?
>
> A. Wasn't nothing for them to teach you."

(Tr. 104-105).

Stewart also testified that following the shutdown of Pearson's sawmill, wood began coming from Belcher Lumber Company in 1982 to be planed. (Tr. 115-116). Stewart recalled that the amount of board feet of lumber coming through the planer increased and they worked sixteen hours a day. (Tr. 117-118). Stewart says that

this also increased the number of repair problems on the planer. (Tr. 118). Stewart testified that he was unable to make all of the repairs himself and that Sonny Cook from the machine shop made some of the repairs. (Tr. 118-120). He recalls that the planer operators before him had had helpers and that Cook was transferred to the planer operation to be his helper. (Tr. 120-122). While Cook and Stewart worked together at the planer operation, Cook never "messed up" any lumber because Stewart never allowed him to align the planer. (Tr. 122-124).

Although Stewart denied that Clant Johnson ever gave him any instructions on how to operate the planer (Tr. 124-125, 134-135), saying that he did not want or need anyone to give such instructions (Tr. 134), the trial court had to make a credibility determination between an objective, disinterested witness, Johnson, and an interested party, Stewart. The court obviously decided that Johnson's version of the facts were more credible.

Consistently with Clant Johnson's testimony, Stewart testified that he did not change the method by which he operated the planer following the introduction of the wood from Belcher Lumber Company. (Tr. 131). By way of contrast, Stewart conceded that Cook did run the planer the way Clant Johnson taught him. (Tr. 124).

Stewart's arguments on this appeal, which will be discussed hereinbelow, are primarily directed to the issue of pretext. However, "The 'ultimate question' in a disparate treatment case is not whether the plaintiff established a prima facie case or demonstrated pretext, but 'whether the defendant intentionally discriminated against the plaintiff'." Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1184 (11th Cir. 1984), quoting from

challenge of doing what we had to be done there at the planer."

(Tr. 335).

Stewart says that this reason is contradicted by the Answer filed by Pearson Lumber Company in this case which states that "the Plaintiff, among others, was requested to help with training of Clarence Cook, Caucasian." The operative word in this statement is "help". Pearson Lumber Company has never contended that Stewart knows nothing about planning wood, and to this extent he could obviously assist in familiarizing Cook with the planer operation. However, the Dendys relied on Clant Johnson "to teach Mr. Cook the fine points" such as how to properly set up and run the planer. (Tr. 313). Stewart would not learn or apply these "fine points" and was fired.

Stewart also points to his own testimony wherein he recalled an occasion after his discharge in which he saw Walt Dendy, Emmett Dendy's son, in an auto parts store. He says Walt Dendy asked him a question about pouring fuel on lumber to get it through the planer. He testified that he told Walt "I didn't know nothing about using no fuel on lumber to get it through the planer. (Tr. 57-61). This is a far cry from Stewart's charac-

terization of the encounter as a request "for help, information, advice and assistance regarding problems with the planer" (Brief of Appellant, 16), and certainly does not negate the conclusion that Stewart was unable, for whatever reason, to learn and utilize the alignment techniques that Clant Johnson had tried to teach him.

Stewart also points to the testimony of Emmett Dendy to the effect that Stewart was operating the planer fifty to sixty hours a week, as well as payroll records reflecting that he was paid more than other employees, and asserts that this shows he was "able to learn". (Brief of Appellant, 16-17). However, putting in time doing a job does not equate with doing a job properly. Moreover, Stewart was paid an excellent wage and his performance was expected to be of similar caliber. As Emmett Dendy testified, "We were expecting that job -- that much performance and we weren't getting it. (Tr. 341). As he further testified, "if he wasn't worth it, we wanted him to work up to where he could earn it, but that was not taking place." (Tr. 344).

Similarly, the testimony of Stewart's fellow employees that he had "singlehandedly operated the planer for years" (Brief of Appelant, 18) has nothing to do with whether he was able or willing to learn new

techniques from Clant Johnson.

Finally, Stewart notes that his co-employees testified that he "was a superior planer compared to Sonny Cook". (Brief of Appelant, 18). Nine of Stewart's co-employees testified for Stewart and their testimony is instructive not only as to Stewart's credibility, but their own as well.

O. C. Tinker testified on direct examination that Stewart had worked alone as planer operator for four or five years before his discharge in April of 1983. However, on cross-examination he admitted that he himself had only worked there since 1982, thus demonstrating his lack of personal knowledge. (Tr. 153-155).

to mean "Two, three, or four". Fourth, Stewart testified that the Dendys "checked the lumber" by measuring it "about every half hour". (Tr. 35). Stewart's former co-employees testified that the Dendys checked the lumber "once or twice a day". (Tr. 235-236) and "every thousand" board feet of lumber could have easily been ruined between checks by the Dendys. In any event, as the trial court noted regarding the conflict of testimony, "If it's a conflict, it's my job to decide which one is right." (Tr. 351).

Next, Stewart asserts that "several thousand board feet of lumber" could not have its grade lowered in light of the statement in the Statement of Position that "planing is under constant observation." (Exhibit 26, Paragraph 10). Emmett Dendy testified that the planer was under constant observation by the grader and the planer, not the Dendys. (Tr. 354-355). Moreover, this "observation" would not necessarily prevent "lowering the grade" on the lumber. Stewart's own witness, Clarence McKinney, testified that the lumber grader, Greg Hill, was not doing his job properly. (Tr. 250-252). Likewise, Stewart testified that he did not check the wood constantly, (Tr. 21, 131).

Stewart next asserts that "Mr. Willie Hill, then and now Pearson Lumber's chief lumber grader, testified that on the next working day after Mr. Stewart was fired he inspected Mr. Stewart's output and neither saw nor heard of anything unusual about it." (Brief of Appelant, 20). However, the trial judge stated on the

the Planer! Strange credentials indeed for an "ex-plainer"! R3-334,5

1-Walter Dendy's ANSWER - On Page 25 Defendant asserts that there is no contradiction by the Answer because the word "help" in the Answer is supposed to resolve the utter contradiction between being a trainer of Planing one month and being unable to learn how to properly operate the Planer several months later.

The obvious response to this is: Where in the trial was this said?! There is no reference to it because it was never said! It is Walter Dendy's Answer which self-contradicts Walter Dendy's reason but Walter Dendy would not take the stand! This "explanation" is Attorney McIlwain trying to testify in the brief, nothing from Walter Dendy or the trial!

In addition, please note this: During the trial, when Emmett Dendy was confronted with the fact that the Answer utterly contradicted Walter Dendy's "inability to learn" reason, Emmett Dendy refused to respond since he said it was Walter Dendy's Answer not his. Attorney McIlwain then interrupted and "testified" that this contradiction was resolved because of the words "among others" in the Answer rather than the word "help"! R3-340 In other words Atty. McIlwain cannot even agree with

himself about what magic bullet is somehow supposed to reconcile the irreconcilable!

2-Walter Dendy's Request for Help - Defendant's response, on Page 25 of the brief, to this contradiction is simply to take one sentence completely out of context of five pages of testimony!

Fortunately the antidote to this is obvious and easy: Plaintiff urges and invites this Court to read pages 57-61 of the transcript R2-56, 7, 8, 9, 60, 1 to satisfy itself what happened between Mr. Stewart and Walter Dendy at the store. The Court will find that what happened is exactly what Plaintiff said happened: Walter Dendy was asking Mr. Stewart for help, information, advice, and assistance about problems with the Planer months after he fired Mr. Stewart for being <u>unable to learn</u> how to properly operate the Planer. To make it even worse these problems had only appeared <u>after</u> Walter Dendy fired Mr. Stewart! R2-61

3-Emmett Dendy's Statement - Defendant, on page 26 of it's brief, simply does not deal with this contradiction at all. Its entire response is one enigmatic sentence that "putting in time does not equate with doing a job properly".

However, Emmett Dendy's deposition statement is: " 'And when we brought him up' -- him I'm sure you're talking about Sonny Cook -- 'him from the shop to assist and help out, because we were running generally fifty to sixty hours, and Jack couldn't physically do it, one person do all of that'" R3-331,2

To reiterate from Plaintiff's primary brief: We have Emmett Dendy stating that Mr. Stewart was singlehandedly operating the Planer fifty to sixty hours a week and that the only problem was that no one person, Jack Stewart or anyone else, could physically maintain such a gruelling schedule, Ie - There was no problem with the quality of Mr. Stewart's job performance!

Fifty to Sixty hours a week, singlehandedly, no problem with the quality; yet . . . he was unable to learn how to properly operate the Planer!

4-The Payroll Records-Defendant, on Page 26 of its brief, also simply does not deal with this contradiction: Its entire response is Emmett Dendy saying that Mr. Stewart's job performance "wasn't worth" the high salary he was paid.

Plaintiff would point out:1-The Dendys, like any businessmen, are going to pay only what they have to - every dollar they pay an employee is a dollar out of

their own pocket. Emmett Dendy offers no reason why Defendant was paying such a high wage to Mr. Stewart if he was not "worth it", if his performance was not what they expected. 2-The Dendys observed Mr. Stewart's job performance "many times per day" (See Sect. 10 of "STATEMENT . . ."), they were in an especially good position to judge Mr. Stewart's worth. 3-Last but not least, it is undisputed that Mr. Stewart had been receiving his high $7/hr. wage for two years before he was fired! R2-113,4 There was no question of his failing to "work up" to some level: The Dendys, observing his work many times per day, had been paying this employee supposedly unable to learn how to properly do his job $7/hr. wage for two years when most employees were getting only $4-$5/hr. !

5-Pearson Lumber's Employees-On page 26 Defendant simply misstates the contradiction: The testimony of the employees that Mr. Stewart singlehandedly operated the Planer for years contradicts Walter Dendy's reason that Mr. Stewart was unable to learn how to properly operate the Planer, not whether "he was able or willing to learn new techniques from Clant Johnson"! As we have already seen, Walter Dendy states in Sect. 11 and 02 of his

"STATEMENT. . ." that he alone supposedly observed Mr. Stewart's unsatisfactory performance and he alone supposedly discussed

crimes of subornation of perjury and obstruction of justice. See Pages 228 -246 of transcript. Plaintiff was unable to prove this because Judge Guin refused to admit the tape-recording into evidence or to allow it to be used to refresh recollection. R3-244,5,5.

To recapitulate: Eight employees, four of them still employed at Pearson Lumber, testified that Mr. Stewart, the man supposedly unable to learn how to properly operate the Planer, had singlehandedly operated the Planer for years.

Emmett Dendy denied this, saying 5-6 months. He produced no witnesses to support him.

All the employees asked (ie - those closely associated with the Planer) testified that Mr. Stewart had been a superior Planer compared to Mr. Cook when replaced by Mr. Cook.

Walter Dendy, of course, would not even testify.

REASON # 2: ON APRIL 29, 1983, MR. STEWART'S OPERATION OF THE PLANER CAUSED SEVERAL THOUSAN FEET OF LUMBER TO BE LOWERED IN GRADE (SECT. 09) AND REDUCED IN VALUE (SECT.02)

Section 10 of Walter Dendy's "STATEMENT. . ." self-contradicts Walter Dendy's second reason for his firing of Mr. Stewart in two ways:

A-Planing this several thousand feet of lumber takes at least 30 minutes, possibly 3-4 hours R2-36, R3-350 But Walter Dendy, in Sect. 10 states that the Planing is "under "constant observation" to ensure the grade and value of the lumber! This is not merely a self-contradiction by Walter Dendy, it is a word for word ("grade and value"; "grade and value") self-contradiction!

How did Defendant explain Walter Dendy's word for word self-contradiction? It simply didn't, indeed couldn't, since Walter Dendy would not testify!

B- Mr. Stewart testified that "several thousand" feet of lumber would take about 3-4 hours to plane (plaintiff agrees wholeheartedly that "several thousand" is a vague term. . . a vague term of Walter Dendy's). Emmett Dendy denied this, saying about 30 minutes, but Walter Dendy would not deny it.

If it takes 3-4 hours then ruining several thousand feet again cannot happen since the Dendys observe the Planing "many times per day". (This is why the Dendys, out of desperation, point-blank lied in their depositions and changed the story to once or twice a day R3-355,7) even though the lies are openly and baldly exposed by "many times per day"!)

All Defendant does on pages 32 and 33 of its brief is restate, in a very confusing and convoluted way, the

discrepancy between Emmett Dendy and Mr. Stewart. It of course, does not deal with the fact that Walter Dendy would not dispute Mr. Stewart or that when Emmett Dendy was asked, point-blank, at his deposition in 1987, "Why was Jack Stewart fired?", he said absolutely nothing not one word about ruining several thousand feet of lumber on April 29, 1983 (or inability to learn how to properly operate the Planer, for that matter)!

Mr. Willie Hill, then and now Pearson Lumber's chief Grader, testified from his EEOC affidavit that on the next working day after Mr. Stewart was fired he inspected Mr. Stewart's output and

PEARSON LUMBER COMPANY

July 1983

STATEMENT POSITION CONCERNING LAYOFF OF MR. JOE JACK STEWART

01. Pearson Lumber Company employs less th 100 people and is exempt from filing Form EEO-1.

02. Pearson Lumber Company does not discrim ate against anyone because of race, and does not discriminate in rate of pay. The particulars are as follows:

On April 29,1983, Mr. Joe Jack Stewart was laid off from his position as planer operator at Pearson Lumber Comp . He was told by Mr. Walt Dendy, partner of Pearson Lumber Company, tha he company had to make some changes in its planer mill operation. The proble ith Mr. Stewart's performance had been developing over several months. He wa aid off for the following reasons: 1) inability to learn as much as he ne d to know for the proper operation of the planer; 2) lack

of concern for the ality of the production he was responsible for, and 3) lack of judgement in t calling for assistance when a problem beyond his ability to solve developed. Mr. Stewart's performance did not improve with several maintainance and quality discussions with Walt Dendy. On April 29,1983 when Mr. Stewart's improper operation of the planer caused several thou - sand board feet of high grade lumber to be reduced in value, he was laid off. He had 1) not recognized the problem with the planer, but, worse, than that 2) not been concerned that the lumber was not meeting quality standards, although this was obvious from the most cursory glance, and even worse, 3) had not stopped the machine and told management that there was a problem, but instead covered it up. Had this defect in the lumber not been uncovered and the product shipped to a customer, serious financial claims could have arisen. As it was, the lumber had to be sold at a lower price.

As you can see, Mr. Stewart was relieve for reasons that had nothing to do with his race,

Several months before April 29, Walt Dendy had told Mr. Stewart he wanted to train another man in the operation of the pl r. The company needed to have another man knowledgeable about this key posiion, not only because of the possibility of a sickness by Mr. Stewart, but because i easi business demands were requiring that the company's normal Monday-Friday 7 AM- 3:45 PM for working week be lengthened to 7AM-7:45 PM Mondy-Friday and 7 3:45 on Saturday. One man could not work hours per week. There was no sig icance in the fact that the man being trained, Clarence (Sonny) Cook was white-- he wa the most familiar with machinery of any of the employees available for the job with the closing of the sawmill had less demands on his time.

On April 29, 1983, Mr. Stewart's rat f pay was $7.00 per hour. Sonny Cook was paid $6.50 per hour as assistant pla mill operator. On May 13, 1983, with Mr. Cook's promotion to head

planer mill erator his pay was increased to $7.00 per hour. Mr. Gregory Hill, a black man as judged most qualified as assistant planer operator, and his rate of pay $6.50 per hour. As you can see there is no discrimination in rate of pay.

03. The company does not have a seniorit ystem. Layoffs are made only when dictated by business conditions, such as the sing of the Pearson Lumber Company sawmill on October 15, 1982. All of the men ssociated with the sawmill had to be laid off when it closed.

04. The company is not subject to a coll ive bargaining agreeement and does not have a written personnel policy. If a la f is necessary due to the closeing down of an operation the men associated with at operation are laid off. Individuals are laid off only if their work is unsat actory.

05. Layoffs 4/1/82 to present- see atta ed list.

06.There is no written policy concerning ecalls. Whenever a job opening occurs, every effort is made to offer the jo o a former employee who would be qualified for the job.

07. Recalls 4/1/82 to present- see atta ed list.

08. New hires since 4/29/82- see attach schedule

09. Mr. Joe Jack Stewart was laid off fo he following reasons developing over a period of several months, 1) inability learn as much as he needed to know for the proper operation of the planer 2) la of concern for the quality of the production he was responsible for and 3) la of judgement in not calling for assistance when a problem beyond his ability to lve developed. Mr. Stewart's performance had been poor for a period of some m hs and culminated on April 29, 1983, with Mr. Stewart's actions needlessly low ing the grade on several thousand board feet of lumber.

10. The work of the planer operator is ob erved many times per day by Mr. Walt Dendy and Mr. Emmett Dendy, partners of Pe son Lumber Company. As the planing mill is one of the most important steps in t pro

process, with the quality of planing having significant effect on e grade and, therefore, value of the lumber, planing is under constant obser ion.

11. Mr. Stewart's declining performance personally observed by Mr. Walt Dendy.

12. There are no bumping rights during yoff or recall.

13. duties of the planer operator:

A. Maintain machine by regular g easing, screw-tightening, etc. Be on the lookout for major m tenance and repairs needed and advise Walt Dendy.

B. Regularly grind knieves for pl ner

C.S Set plaine of proper setting specified in orders.

D. Monitor production to make su planer is putting out a good quality product. Stop machine and make adjustments if quality problems de p.

E. Maintain production by avoid breakdown by preventative maintainance.

The job duties of the assistant plane perator

are to assist the main planer operator and to operatee the planer in s absence. On April 29, 1983, Mr. Joe Jack Stewart and Sonny Cook were the only planer operators.

14. We do not keep personnel files with wr tten performance evaluations

PEARSON LUMBER COMPANY

Walter P. Dendy, Partner

July 5, 1983